IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

TIMMY HOWARD DICKEY, *Petitioner*, *v.* ROBERT PATTON, Director, and THE STATE OF OKLAHOMA, *Respondents*.	))))))))))	Case No. CIV-15-685-M

APPLICATION FOR A CERTIFICATE OF APPEALABILITY

The Petitioner, Timmy Howard Dickey, hereby applies for a Certificate of Appealability pursuant to 28 U.S.C. § 2253(c)(2), so that he may appeal the dismissal of his Petition to the United States Court of Appeals for the Tenth Circuit.

ARGUMENT AND AUTHORITY

Dickey petitioned this Court for federal habeas relief from his unconstitutional state court conviction. The State filed a motion to dismiss on the basis that Dickey was no longer "in custody" which is a requirement under the rules governing habeas corpus. D.E. 8. The magistrate issued a Report and Recommendation on September 28, 2015, agreeing with the State, and recommending that the Petition be dismissed for lack of jurisdiction. D.E. 10. Dickey objected. D.E. 11.

On December 10, 2015, this Court adopted the Report and Recommendation and ordered the Petition dismissed for a lack of jurisdiction. D.E. 12 (Order); D.E. 13 (Judgment). Dickey filed Notice of Appeal on December 21, 2015. D.E. 14.

However, in order to appeal, Dickey must, *presumably*, obtain a Certificate of Appealability. *See* 28 U.S.C. § 2253(c)(2); *McCormick v. Kline*, 572 F.3d 841, 847 (10th Cir. 2009) (COA granted by the district court on the issue of whether the Petitioner was in custody for habeas purposes).[1]

28 U.S.C. § 2253(c)(2) states simply that a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." The United States Supreme Court has addressed the legal standard as follows:

> Consistent with our prior precedent and the text of the habeas corpus statute, we reiterate that a prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.

---

[1] Dickey seeks a COA because the statute appears to require it, but there is a question of whether a COA is required in a case such as this one where the dismissal was based upon jurisdiction, as opposed to the merits of the underlying claims. *See*, *e.g.*, *Dunn v. Cockrell*, 302 F.3d 491, 492 (5th Cir. 2002) (COA not required to review rulings on non-merits issues); *Lave v. Dretke*, 416 F.3d 372, 382 (5th Cir. 2005) (COA not required to review the denial of a motion to stay). Thus, Dickey asserts that he may appeal the non-merits decision of this Court without first obtaining a COA. However, since the law appears to be unclear on this issue (*McCormick* involved a case like this one where a COA was obtained, but whether a COA was *required* was not at issue in that case), Dickey believes that it is advisable to seek a COA in the district court in the first instance.

Miller-El v. Cockrell, 537 U.S. 322 (2003). The Supreme Court reiterated that "we decide again that when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. *Id. (citing Slack v. McDaniel*, 529 U.S. 473, 481 (2000)).

In addition, any doubts must be resolved in favor of Dickey with respect to the granting of a Certificate of Appealability. *See Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir. 1997); *Miller v. Champion*, 161 F.3d 1249, 1251 (10th Cir. 1998); *see also Habteselassie v. Novack*, 209 F.3d 1208, 1209 (10th Cir. 2000) (COA denied by the District Court but granted by the Tenth Circuit).

Dickey seeks a COA on the following issues:

1. Is he in "custody" for purposes of federal habeas corpus law?
2. Is he nevertheless entitled to relief under the All Writs Act via writ of *coram nobis* and/or writ of *audita querela*?

A. CUSTODY.

The legal question of whether the requirements of sex offender registration under Oklahoma law is debatable among reasonable jurists. It is true that the Tenth Circuit has considered the question with regard to the Colorado sex registration scheme in *Calhoun v. Attorney General of Colorado*, 745 F.3d 1070 (10th Cir. 2014), but Dickey has shown that the Oklahoma sex offender registration scheme is sufficiently different to warrant further analysis, and the issue is certainly not foreclosed by *Calhoun*.

Dickey reminds the Court that the requirements at issue in *Calhoun* were: 1) an annual appearance in person before the local sheriff to be photographed and fingerprinted; 2) provide physical address, place of employment, vehicle information, and e-mail and other internet identifiers; 3) and re-register within five days of any change, and the sheriff must verify the changes in the information. *Calhoun*, 745 F.3d at 1072-73.

In contrast, Oklahoma's registration requirements are more onerous than the ones at issue in *Calhoun*, because Oklahoma requires: 1) the offender to submit a blood or saliva sample for DNA collection; 2) intrusion upon work activity by forbidding the offender to *work* with children or at a school; 3) forbidding the offender to *live*, either temporarily or permanently, within a 2,000-foot radius of any school, campsite, playground, park, or child care center; and 4) forbidding the offender from *living* in a home with another sex offender.

The bottom line is that, in *Calhoun*, the Tenth Circuit found that Colorado's scheme, as presented by Calhoun, did not impact his rights to "live, work, or travel." *Calhoun*, 745 F.3d at 1074. In contrast, Oklahoma law interferes substantially with

Dickey's rights *to all three*, including his right to associate by precluding him from living in a home with anyone who is also a sex offender. None of *these* restrictions were at issue in *Calhoun*, and Dickey is not aware of any other circuit authority addressing whether these *residency and work* restrictions, in addition to the *registration* requirements, sufficiently impact the freedom of a petitioner so as to render him in custody for federal habeas purposes.

Thus, the Oklahoma scheme is punitive, as so held by the Oklahoma appellate courts construing state law, and other state courts have held the same way. *See Starkey v. Oklahoma Department of Corrections*, 2013 OK 43, 305 P.3d 1004 (Oklahoma registration scheme is punitive and part of the sentence); *see also Doe v. State*, 189 P.3d 999 (Alaska 2008) (SORA not retroactive because it is punitive); *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009) (residency restrictions of SORA punitive).

B. ALL WRITS ACT.

The same is true for Dickey's claim under the All Writs Act. It is debatable whether he is entitled to relief–or at least a ruling on the merits–regarding his claim of right to a writ of *coram nobis* or a writ of *audita querela*.

As Dickey outlined in his response to the State's motion to dismiss, he is aware of *Rawlins v. Kansas*, 714 F.3d 1189 (10th Cir. 2013), which construed the All Writs

Act narrowly, to preclude such relief by a federal court dealing with a state court judgment.

However, the legal issue is debatable and Dickey believes that *Rawlins* is in conflict with *United States v. Morgan*, 346 U.S. 502 (1954), which held that these common law writs were not abolished by the Federal Rules in criminal cases. The Tenth Circuit in *Rawlins* held that circuit precedent construed *Morgan* in a way that precluded the federal courts from employing these writs to overturn state court judgments; however, Dickey believes *Rawlins* and its progeny to be wrongly decided, in conflict with *Morgan*, objects to this line of precedent, and moves this Court to grant a COA so that the Tenth Circuit may consider these writs in this case.

WHEREFORE, Timmy Howard Dickey hereby requests that this Court issue a Certificate of Appealability in this case.

Respectfully submitted,

/s/ James L. Hankins

James L. Hankins, OBA #15506
HANKINS LAW OFFICE
TIMBERBROOKE BUSINESS CENTER
929 N.W. 164th St.
Edmond, Oklahoma 73013
Telephone: (405) 753-4150
Facsimile: (405) 445-4956
E-mail: jameshankins@ocdw.com
Counsel for Petitioner, Timmy Howard Dickey

CERTIFICATE OF SERVICE

This is to certify that on this 7th day of January, 2016, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing. Based on the records currently in the file, the Clerk of the Court will transmit a Notice of Electronic filing to the following ECF Registrant:

Jay Schniederjan

/s/ James L. Hankins
James L. Hankins